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IN THE

Supreme Court of the United States

October Term, 1974

ROMAN GRIBBS, Mayor of the City of Detroit, et al., Petitioners,

v.

AMERICAN MINI THEATRES, INC., a Michigan corporation, and PUSSY CAT THEATRES OF MICHIGAN, INC., a Michigan corporation, Respondents.

— — —

ROMAN GRIBBS, Mayor of the City of Detroit, et al., Petitioners,

v.

NORTOWN THEATRE, INC., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Mayor of the City of Detroit and the other named Petitioners, by and through their attorneys, KERMIT G. BAILER, Corporation Counsel of the City of Detroit, MAUREEN P. REILLY, JOHN E. CROSS and VICTOR G. MARROCCO, Assistants Corporation Counsel, petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in the captioned cases.

OPINIONS BELOW

The opinion of the Court of Appeals (App A, pp 15-39 is not reported. The opinion of the District Court (App. D, pp 43-60) is reported at 373 F Supp 363.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit (App. B, pp. 40-41) was entered on June 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a compelling state interest exists which requires regulation of businesses which offer for sale or exhibition "adult" material.

2. Whether the zoning and licensing regulations affecting "adult" businesses bear a reasonable relation to the legitimate governmental purpose sought to be achieved.

3. Whether the provisions of the new zoning and licensing laws affecting "adult" businesses are clearly defined with narrow specificity and are directed only against those businesses which, in the interest of the general welfare, must be regulated.

4. Whether the provisions of the new zoning and licensing laws affecting "adult businesses" provide procedural due process which do not operate as a prior restraint on the exercise of Respondents' rights under the First and Fourteenth Amendments to the U. S. Constitution.

STATUTES AND ORDINANCES INVOLVED

The legislative body of the City of Detroit is authorized to divide the City into zoning districts, and to regulate and restrict the location of trades therein, by virtue of the authority granted by the Zoning Enabling Act, 1921 PA 207 (MCLA 125.581) which provides:

> "The legislative body of cities and villages may regulate and restrict the location of trades and industries and the location of buildings designed for specified uses and for such purposes divide any city or village into districts of such number, shape and area as may be deemed best suited to carry out the provisions of this section. For each of such districts regulations may be imposed designating the uses for which buildings or structures shall or shall not be erected or altered, and designating the trades and industries that shall be permitted or excluded or subjected to special regulations. Such *regulations shall be made* in accordance with a plan designed to lessen congestion on the public streets, to promote public health, safety and general welfare, and shall be made *with reasonable consideration,* among other things, *to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the general trend and character of building and population development.*" (Emphasis added.)

By virtue of that authority, the Detroit City Council enacted several amendments to its Official Zoning Ordinance, which defined certain "adult" businesses, and designated them as "regulated uses". These amendments were

incorporated into Ordinance 742-G, (App. G, pp. 65-79). Section 66.0100 of the Official Zoning Ordinance was not amended, but is inserted here for clarification in reading the amendments incorporated in 742-G. Section 66.0100 provides:

> "Application to establish any of the above regulated uses shall be made to the City Plan Commission, who shall not approve such request if there is already in existence two or more such regulated uses within 1,000 feet of the boundaries of the site of the proposed regulated use, excepting as provided for in Sec. 66.0101."

By Ordinance 743-G, the Detroit City Council amended Chapter 5, Article 2 of the Municipal Code to include within the provisions affecting public entertainment generally, coin-operated motion picture devices, adult motion picture theatres, adult mini motion picture theatres, drive-in theatres and concert halls. The pertinent licensing provisions of Ordinance 743-G are printed in the Appendix at pp. 80-84).

STATEMENT

In 1969, there were located within the City of Detroit, two "adult" bookstores, two "adult" theatres, and an insignificant number of "topless" cabarets. By mid-1972 the number of "adult" theatres had increased to eighteen, "adult" bookstores had increased to twenty-one, and "topless" cabarets numbered approximately seventy. Reports submitted to the Detroit City Council by the Police Department indicated that many of these "adult" businesses were clustering on main streets of the City (and Highland Park, a city within the City of Detroit), which were immediately adjacent to residential neighborhoods. Acting upon complaints of such neighborhood residents, the City Council enacted Ordinance 742-G, *supra*, amending the Official Zoning Ordinance by including "adult" theatres and bookstores, and Class "D" (topless) cabarets in the category of "regulated uses." "Regulated uses" were those uses determined from experience to have a deleterious effect on a neighborhood, and included taxi dance halls, bars, motels, pawnshops, etc. (Sec. 66.0000). Such uses were restricted in their location, i.e., no more than two "regulated uses" were to be permitted within 1,000 feet of each other. This prohibition could be waived by the City Plan Commission upon a showing that the proposed location of the "regulated use" would not be injurious to the surrounding area. (Sec. 66.0101.)

In addition, Sec. 66.0103 of the Ordinance prohibited the location of an "adult" business within five hundred feet of a residential unit unless the prohibition was waived by the consent of fifty-one percent of the persons living or doing business within five hundred feet of the proposed location.[1]

Ordinance 743-G amended the Municipal Code to include "adult" theatres under Chapter 5, Article 2, entitled "Public Entertainment Generally" and required that they be licensed by the City.

---

[1] The District Court ruled that this provision was unconstitutional as it was more restrictive than necessary to achieve the City's legitimate governmental purpose. The Court stated that the ordinance, as written, protected a *single* residential unit, when the City continually asserted its purpose in enacting the ordinance was the protection of *neighborhoods*. In order to correct the "defect" noted by the District Court, the City amended Sec. 66.0103 to prohibit the location of "adult" businesses within five hundred feet of a "residentially zoned district." (See Ordinance 891-G, App I, pp 84-92.)

Subsequent to the enactment of the above described ordinances on November 2, 1972, the Respondent Nortown Theatre, Inc. began exhibiting films which were "adult", as defined in Sec. 32.0007 (App. G, at pp. 65-68) in an established theatre which was within 1,000 feet of several other regulated uses and within five hundred feet of a residential area. The Respondents American Mini Theatre, Inc. and Pussy Cat Theatres, Inc., converted a corner gas station to a mini theatre and offered similar "adult" fare for exhibition. The newly renovated theatre was within 1,000 feet of two other regulated uses and within five hundred feet of a residential area. The Respondents were notified by the Petitioners of the City's intention to enjoin their operation under the State Zoning Enabling Act and the City zoning ordinances.

In the spring of 1973, following such notification, the Respondents claimed their constitutional rights under the First, Fifth, and Fourteenth Amendments were threatened by the proposed action of the various City officials, and sought declaratory and injunctive relief in the Federal District Court, Eastern District of Michigan, under 42 USC 1983. The jurisdiction of the Court was invoked under 28 USC 1331 and 28 USC 1343 (3).

The District Court consolidated the cases for argument and, on March 22, 1974, issued a joint opinion which recognized the City's legitimate governmental purpose, and upheld the validity of the challenged ordinances with the exception noted in Footnote 1 above. (App. D, pp. 43-60). Judgment was entered in the *Nortown* case on April 25, 1974 (App. E, at p. 64) and in the *American Mini Theatres* case on May 20, 1974 (App. F, p. 63). Respondents appealed the decision to the Sixth Circuit Court of Appeals. On June 16, 1975, the Appellate Court, in a two to one decision,

ruled that the ordinances were unconstitutional as they related to "adult" material, presumably protected by the First Amendment, in a different manner than other protected material, solely on the basis of content. (App. A, pp. 15-39). Judgment was entered the same day. (App. B, p. 40).

On July 18, 1975, a Stay of Mandate was issued by the Hons. Edwards, Celebrezze and Lively, the panel which decided the case in the Court of Appeals. (App. C, p. 42).

REASONS FOR GRANTING THE WRIT

The Court of Appeals of the Sixth Circuit, by a two to one decision, has ruled that the zoning and licensing ordinances enacted by the City of Detroit to control the proliferation of "adult" businesses within the City are unconstitutional, as they are violative of the equal protection clause of the Fourteenth Amendment. The basis for this ruling, apparently, is that "adult" businesses which offer for exhibition or sale "adult" material, presumably protected by the First Amendment, cannot be treated in a different manner than other similar businesses offering "non-adult" material, solely on the basis of the content of the material offered for sale or exhibition.

The ruling by the Court of Appeals decides an important issue of federal law which has not been, but should be, settled by this Honorable Court. As pointed out by the Honorable Anthony J. Celebrezze, in his strong dissenting opinion, the majority ruling of the Court of Appeals that the cities may not regulate, by narrowly drawn licensing and zoning ordinances, those businesses which have been shown to have a deleterious effect on the surrounding resi-

dential neighborhoods and the other businesses which serve the neighborhood families, is contrary to applicable rulings of this Honorable Court.

The decision of the Court of Appeals invalidating Ordinances 742-G and 743-G as a denial of equal protection, was based primarily upon *Police Department of Chicago v. Moseley,* 408 US 92 (1972). That case invalidated an ordinance which prohibited all picketing within 100 feet of any school building during classes except "the peaceful picketing of any school involved in a labor dispute." The U. S. Supreme Court could find *no rational basis* for the distinction between "all other peaceful picketing" and "peaceful picketing involving a labor dispute." There was no showing that the ill effects on the schools caused by "all other peaceful picketing" were different from the ill effects of "peaceful picketing involved in a labor dispute." The case is distinguishable from the case at bar because Petitioners have made a showing that the deleterious effects on a neighborhood are caused, not by all theatres and bookstores, but only those of an "adult" nature. The separate classification and treatment of "adult" theatres and bookstores is necessary not because the contents of the material disseminated in "adult" bookstores and theatres is different, but because of the ill effects on the neighborhood caused by the establishment and operation of those businesses, which effects are not caused by "non-adult" businesses.

As stated by the Honorable Celebrezze in his dissent (page 21):

> "The ordinance goes out of its way not to bar these businesses from a convenient market. Its purpose is, rather, to prevent the breakdown of neighborhoods caused by undue concentrations of these businesses. If non-adult bookstores and theatres contributed to neighborhood blight in the same way

> that adult businesses do, the City would, no doubt, include them as designated uses under the ordinance, just as shoe-shine parlors and bars are included. It is not a control on the basis of content in which the City of Detroit is engaging. It is, instead, a justifiable distinction in neighborhood impact that underlies the differential treatment between adult and non-adult businesses. This amply distinguishes our case from *Moseley,* where the City was unable to justify a differential treatment of peaceful labor picketing and peaceful non-labor picketing. The only conceivable reason for the difference in *Moseley* was that the City sought 'to restrict expression because of its message, its ideas, it subject matter, or its content'. *Moseley,* 408 US at 95. That is not the purpose of Detroit's ordinance."

The United States Supreme Court has recognized that a classification may be based on the content of the material regulated, if the ill effects caused by the expression of particular ideas in a particular manner, in a particular place, warrant remedial legislation and the regultion is not total prohibition. *Grayned v. City of Rockford,* 408 US 104, 115 (1972); *Cox v. Louisiana,* 379 US 559, *Rehearing Den.* 380 US 926 (1965); *Cox v. New Hampshire,* 312 US 569 (1941). The challenged city ordinances regulate the *location* of adult businesses, but do not prohibit them, nor censor the content once the business has been established.

The Court of Appeals noted, and apparently has determined that "although the application of the ordinances is confined to 'adult' forms of entertainment, they are not designed to protect minors from harmful influences." The brief and affidavit submitted by Petitioners refute this

contention as they repeatedly emphasize the necessity of protecting and preserving the residential areas of the City and the business districts which serve them. Ordinances seeking to protect and preserve residential zoning districts have always been enacted with the intent of providing a suitable atmosphere for family living, and a suitable atmosphere to raise children. This basic principle of zoning residential areas to provide for *family* needs has been consistently recognized by our courts, most recently in *Berman v. Parker*, 348 US 26 (1945) and *Village of Belle Terre v. Boraas*, 416 US 1 (1974) where a zoning ordinance was recognized as:

> " . . . economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the equal protection clause if the law be 'reasonable, not arbitrary,' (citation omitted) and bears 'a rational relationship to a (permissible) state objective.'...
>
> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

The Court of Appeals has applied the test in *U.S. v. O'Brien*, 391 US 367 (1968) and found the city ordinances wanting. Petitioners respectfully submit that the dissenting opinion of the Honorable Celebrezze is a correct interpretation of the O'Brien test and, thus interpreted and applied, the city ordinances should be upheld.

The limited effect of the ordinances on "adult" businesses only was intentional to avoid a claim of overbreadth which would surely be made if the regulations were enacted with respect to all theatres and bookstores. The regulations were purposely limited to "adult" theatres and bookstores because they are the cause of the adverse effects on neighborhoods, which adverse effects provide the compelling state interest required in order to support a regulation of the dissemination of First Amendment material. *Grayned v. Rockford, supra; Cox v. New Hampshire, supra.*

The "solutions" posed by the Court of Appeals are not solutions, as they would be overbroad, and would require families to resort to clusters of adult businesses if they wish to attend a movie at all. As the Honorable Celebrezze stated, "indeed, the . . . . suggested solution would accomplish precisely what Detroit seeks to prevent." It is respectfully submitted that the ordinances were narrowly drawn in the most limited manner possible to accomplish the legitimate governmental purpose sought to be achieved.

Unless this Honorable Court grants Petitioners' request for ceritorari, the City of Detroit will be unable to effectively forestall any theatre in the City of Detroit from exhibiting any film of "adult" nature as defined by Ordinance 742-G, or prohibit the establishment of "adult" book sections in every bookstore, grocery store or drugstore in the City of Detroit, or curtail the number of new "adult" theatres or bookstores which may be opened in virtually every business district in the City, regardless of their proximity to a residential neighborhood.

The City's anti-pornography ordinance is effective only on a piecemeal, item by item basis, but enforcement of the ordinance against apparent pornagraphy in lengthy trials

and appeals does not close down the "adult" businesses, nor does it preserve the neighborhood.

Further, if the interpretation of the Court of Appeals' decision is that it invalidates Ordinance 742-G as it regulates Class "D" cabarets, there would be no effective means of curtailing the six hundred fifty-three cabarets licensed to provide entertainment in the City of Detroit from providing "topless" entertainment along with the seventy Class "D" cabarets already licensed for such entertainment, regardless of their location in the City of Detroit. This interpretation is clearly contrary to this Honorable Court's decision in *California v. LaRue*, 93 S Ct 390, 409 US 109, 34 L Ed 2d 342 (1972); and to *Crownover v. Musick*, 509 Pac 2d 497, *cert den* 39 L Ed 2d 489 (Cal. 1974).

It should also be emphasized here that several other cities throughout the United States, who have adopted similar regulatory measures using the Detroit ordinances as a model, will likewise be faced with an inability to effectively deal with "adult" businesses in their communities.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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By: /s/ Maureen P. Reilly

Dated: July, 1975.

APPENDIX A

OPINION OF THE COURT

Decided and Filed June 16, 1975.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

74-2129 American Mini Theatres, Inc., a Michigan corporation and Pussy Cat Theatres of Michigan, Inc., a Michigan corporation, Plaintiffs-Appellants, v. Roman Gribbs, Mayor of the City of Detroit, et al., Defendants-Appellees. — — — — — — — — — — — — 74-2303 Nortown Theatre, Inc., Plaintiff-Appellant, v. Roman Gribbs, Mayor of the City of Detroit, et al., Defendants-Appellees.	Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

Before: Edwards, Celebrezze and Lively, Circuit Judges.

Lively, Circuit Judge, delivered the opinion of the Court in which Edwards, Circuit Judge, joined. Celebrezze, Circuit Judge, (pp. 15-23) filed a separate dissenting opinion.

Lively, Circuit Judge. This case deals with a city zoning ordinance which classifies and regulates "adult" movie theatres and bookstores solely on the basis of the content of the materials which they purvey. Except for one feature the zoning ordinance and a related code amendment were held valid by the district court as against charges that they violate the First and Fourteenth Amendments to the Constitution. We reverse.

In 1962 the City of Detroit adopted an Official Zoning Ordinance which contained a finding that concentrations of certain types of businesses tended to have a deleterious effect upon the neighborhoods in which such concentrations took place. By section 66.0000 of that ordinance it was provided that not more than one of any such businesses might be placed within 1,000 feet of any other business establishment of a kind listed in the section. The businesses thus regulated were bars, transient hotels, poolrooms and similar establishments found in "skid row" areas of many cities. Whereas the purpose of most zoning ordinances is to establish separate zones for various uses and to confine such uses to those zones, thus segregating specified uses of land from each other and concentrating each use or class of uses into defined zones, Detroit adopted the theory of "inverse zoning" by which certain land uses were prohibited from concentrating and were required to maintain minimum distances from each other. Of course, all of the uses thus regulated were also subject to the general zoning features of the ordinance which limited them to commercial and industrial zones.

Prior to 1972 the authorities noted the emergence of clusters of "adult" movie theatres and bookstores together with topless bars and "go go" establishments in certain areas of the City. In an attempt to control these concentrations of adult-type entertainment, the City adopted a series of amendments to the Official Zoning Ordinance and

the City Code by ordinance #742-G and #743-G, both of which were made effective November 2, 1972. Ordinance #742-G, *inter alia*, added new sections 32.0007, 66.0000 and 66.0103, which are reproduced in part as follows:

> Section 32.0007 Adult:
>
> Adult Book Store
>
> An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by their emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas," (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.
>
> Adult Motion Picture Theater
>
> An enclosed building with a capacity of 50 or more persons used for presenting material having as a dom- [sic] presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below) for observation by patrons therein.
>
> Adult Mini Motion Picture Theater
>
> An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below), for observation by patrons therein.
>
> For the purpose of this Section, "Specified Sexual Activities" is defined as:

1. Human Genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

And "Specified Anatomical Areas" is defined as:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Section 32.0023 Cabaret.

Group "D" Cabaret

A cabaret which features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers.

66.0000 Regulated Uses

In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area (i.e. not more than two such uses within one thousand feet of each other which would create such adverse effects). Uses subject to these controls are as follows:

Adult

Adult Book Store

Adult Motion Picture Theater

Adult Mini Motion Picture Theater

Cabaret

Group "D" Cabaret

Establishment for the sale of beer or intoxicating liquor for consumption on the premises.

Hotels or motels

Pawnshops

Pool or billiard halls

Public lodging houses

Secondhand stores

Shoeshine parlors

Taxi dance halls

Section 66.0103

It shall be unlawful to hereafter establish any Adult Book Store, Adult Motion Picture Theater, Adult Mini Theater or Class "D" Cabaret within 500 feet of any building containing a residential, dwelling or rooming unit. This prohibition may be waived if the person applying for the waiver shall file with the City Plan Commission a petition which indicates approval of the

> proposed regulated use by 51 per cent of the persons owning, residing or doing business within a radius of 500 feet of the location of the proposed use, the petitioner shall attempt to contact all eligible locations within this radius, and must maintain a list of all addresses at which no contact was made.

Ordinance #743-G, an amendment to the Code of the City of Detroit, provides in part:

> It shall be unlawful for any person to hereafter operate an Adult Motion Picture Theater, Adult Mini Motion Picture Theater or Drive-in Theater until he shall have complied with the requirements of the Official Zoning Ordinance, the provisions of this article and other applicable ordinances of the City of Detroit.

This ordinance contains definitions of adult motion picture theatre, by reference to "Specified Sexual Activities" or "Specified Anatomical Areas," using the same language as contained in ordinance 742-G. In addition to specifying the license fees for each of the defined establishments, the ordinance contains the following provision:

> The Mayor may refuse to issue a license for the operation of any business regulated by this article, and may revoke any license already issued upon proof submitted to him of the violation by an applicant, or licensee, his agent or employee, within the preceding two years, of any criminal statute of the State, or of any ordinance of this city regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby.

The plaintiffs-appellants are lessees and operators of "adult" motion picture theatres in the City of Detroit which are directly affected by the two ordinances in question.

The Supreme Court held in *Euclid* v. *Ambler Co.*, 272 U.S. 365 (1926), that zoning ordinances which classify property by the uses to which it is put and regulate such uses are a proper exercise of the police power. Noting the shift of population in this country to the cities, the Court reasoned that problems connected with police and fire protection, sanitation disposal and other traditional municipal services could be reduced by requiring that various areas of a city be set aside for certain uses and that incompatible uses be prohibited therein. The Euclid zoning ordinance was claimed to be an unreasonable and confiscatory regulation in the guise of exercise of the police power, but the Court held that such laws result from a legitimate exercise of the police power in furtherance of the general welfare and that the legislative judgment must control in setting the classifications and defining the zones. *Id.* at 388. More recently in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), the Supreme Court upheld the validity of a zoning provision which limited a residential area to one-family dwellings and defined the word "family" as "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family." *Id.* at 2. The Court found that the ordinance affected no fundamental rights guaranteed by the Constitution and therefore applied the "rationale relationship" test to the claim that the ordinance violated the equal protection clause of the Fourteenth Amendment. In dissent, Mr. Justice Marshall

stated that the ordinance affected the plaintiffs' "fundamental rights of association and privacy guranteed by the First and Fourteenth Amendments." *Id.* at 13. Thus he would have applied the stricter "compelling interest" test and held the ordinance invalid.

There appears to be no disagreement that the power of a municipality to regulate land uses, however desirable and important the goal may be, cannot be achieved by means of laws which deprive affected persons of their constitutional rights. This was the holding in *Buchanan* v. *Warley,* 245 U.S. 60 (1917), where the Court struck down an ordinance of the City of Louisville which provided that a person of one race could not move into and occupy property in a block where the majority of houses were already occupied by persons of a different race. The Supreme Court did not question the City's claim that the purpose of the ordinance was to promote public peace and prevent conflict and ill will, but held that "this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Id.* at 81. Further, in upholding a comprehensive land use plan for the District of Columbia, the Supreme Court noted in *Berman* v. *Parker,* 348 U.S. 26, 32 (1954), that although matters of this kind are within the police power of a community, the wide latitude in classifying and limiting property uses which is the province of the legislature is "[s]ubject to specified constitutional limitations."

In its brief and oral argument the City of Detroit recognizes that it is regulating matter presumably protected by the First Amendment, but maintains that the ordinances contain no absolute prohibition against dissemination of the First Amendment materials and that the degree of regulation exercised here is permissible under standards enunciated by the Supreme Court. The City filed a number of affidavits by persons trained in the social sciences and experts in real estate values to show that concentrations of adult-type bookstores and theatres would destroy the neighborhood values of the areas in which these concentrations took place. While counter affidavits filed by plaintiffs took issue with the claims that actual property values had declined in areas where these concentrations had taken place, there was nothing offered by the plaintiffs to dispute the statements concerning the decline in "quality of life" and the increase in problems associated with police and fire protection and sanitation brought about by such concentrations. The City of Detroit has demonstrated a compelling and legitimate interest in preserving neighborhood values, aesthetic and social as well as economic. The question is whether ordinances 742-G and 743-G constitute a permissible means of achieving this end.

The City maintains that these ordinances represent the only reasonable means of restricting the numbers of regulated uses which may be located in any neighborhood. It is argued that the choice of methods is left to the legislative body of the City, and that it has chosen a method which only indirectly affects the right of free expression guaranteed by the First Amendment. The City relies principally on *United States* v. *O'Brien,* 391 U.S. 367 (1968), which upheld a statute making it illegal to mutilate or destroy a draft card. The Court in *O'Brien* noted that the statute clearly did not abridge free speech on its face and stated that in dealing with conduct containing both "speech" and "nonspeech" elements, ". . . we think it clear that a governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the

furtherance of that interest." *Id.* at 377. After discussing the important governmental interest involved in orderly administration of the selective service system, the Court concluded that any effect which the statute had on the right of free speech was incidental and that the defendant had been convicted solely for the "noncommunicative impact of his conduct. . . ." *Id.* at 382. Then, as if to make clear the limits of its holding, the Court speaking through Mr. Chief Justice Warren, stated,

> The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg* v. *California,* 283 U. S. 359 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner, or device." Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. See also, *NLRB* v. *Fruit & Vegetable Packers Union,* 377 U. S. 58, 79 (1964) (concurring opinion).
>
> 391 U.S. at 382.

The appellants argue that the two ordinances in the present case are unconstitutional in that they directly impair the right of free expression guaranteed by the First Amendment; that they violate the due process clause of the Fourteenth Amendment in that they are both vague and overbroad; that they fail to provide proper procedural safeguards to those affected by their provisions; and that they violate the equal protection clause of the Fourteenth Amendment. We reject the argument that the real purpose of the ordinances is to bypass the require-

ments for criminal prosecution of persons disseminating obscene materials and to effect this end indirectly by means of zoning and licensing regulations. We are bound by the legislative statement of the purpose of these acts and note that in *United States* v. *O'Brien, supra,* the Court held that it is only the effect of legislation which is important in considering a constitutional challenge, not its purpose. Therefore, regardless of the purpose of the legislation, if its effect is to establish a means by which undesirable films and books which have not been declared obscene may be regulated in a way which makes resort to criminal laws dealing with obscenity largely unnecessary, the device is subject to close scrutiny. See *Bantam Books* v. *Sullivan,* 372 U.S. 58, 69 (1963). We also note that although the application of the ordinances is confined to "adult" forms of entertainment, they are not designed to protect minors from harmful influences. Compare *Ginsberg* v. *New York,* 390 U.S. 629 (1968).

There can be no doubt that movies, though they may be intended primarily for entertainment and are produced for profit, are a form of expression protected by the First Amendment. *Joseph Burstyn, Inc.* v. *Wilson,* 343 U.S. 495, 501 (1952); *Freedman* v. *Maryland,* 380 U.S. 51 (1965); *Interstate Circuit* v. *Dallas,* 390 U.S. 676, 682 (1968). Each of the cases just cited dealt with statutes and ordinances which were found to violate the due process guarantees of the Fourteenth Amendment, either because of vagueness or overbreadth or failure to provide for speedy judicial determination of the validity of the particular restraint applied. Believing as we do that the two ordinances under consideration in this case are invalid under the equal protection clause of the Fourteenth Amendment, we will pass to a discussion of that issue without dwelling on the due process challenges.

In *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966), a poll tax case, the Supreme Court stated: "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." (Citations omitted.) 383 U.S. at 670. To be valid a statutory classification which affects fundamental freedoms must be necessary to the achievement of a compelling state interest and not just rationally related to a valid public purpose. *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). Since the materials to be exhibited in the theatres of appellants have not been judicially declared obscene under the criteria and procedures prescribed by the Supreme Court in *Miller* v. *California*, 413 U.S. 15 (1973), and related cases, these materials are presumptively within the protection of the First Amendment. The rights guaranteed by the First Amendment are recognized as among the most fundamental rights possessed by a free people. In the present case, claims of abridgement of freedom of expression are conjoined with claims of denial of equal protection. When an equal protection challenge is based on a classification which results in abridgement of First Amendment rights, those seeking to uphold the classification bear a heavy burden.

The City did not discharge its heavy burden of justifying the prior restraint which these ordinances undoubtedly impose by merely establishing that they were designed to serve a compelling public interest. Since fundamental rights are involved, the City had the further burden of showing that the method which it chose to deal with the problem at hand was necessary and that its effect on protected rights was only incidental. The City could legally regulate movie theatres and bookstores under its police

powers by providing that such establishments be operated only in particular areas. It might also have validly provided that such establishments be operated only during certain hours. Cases permitting reasonable regulations as to "time, place and manner" were discussed by the Supreme Court in the recent opinion in *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). However, this ordinance selects for special treatment particular business enterprises which fall within the general business classifications permissible under zoning laws and classifies them as regulated uses solely by referencee to the content of the consitutionally protected materials which they purvey to the public.

A local law, similar in its effect on First Amendment rights, was considered by the Supreme Court in *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972). There the City of Chicago had enacted an ordinance prohibiting picketing within 150 feet of any school building during classes "provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute." The Court held that the ordinance was invalid because it described what was permissible picketing in terms of its subject matter, stating, "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. The City of Chicago asserted that the orinance dealt with a compelling public interest and that its purpose was not to impose improper content censorship, but to prevent disruption in the schools. The Court recognized that the City did have a substantial interest in the end which it was seeking to achieve, but determined that the ordinance sought to advance this interest in a manner which was inconsistent with the requirements of the equal protection clause. The ordinances in the present case, like those in *Mosley*,

"slip[ped] from the neutrality of time, place, and circumstances into a concern about content." 408 U.S. at 99, quoting from: Kalven, The Concept of the *Public Forum: Cox* v. *Louisiana*, 1965 Sup Ct. Rev. 29.

Decided on the same day as *Mosley* was *Grayned* v. *City of Rockford, supra*, in which an anti-noise ordinance was upheld because it "is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with First Amendment rights." 408 U.S. at 119. The Rockford ordinance applied to all noise or diversion which might disrupt school sessions or classes without any classifications which required scrutiny under the equal protection clause. In *Konigsberg* v. *State Bar*, 366 U.S. 36, 50-51 (1961), Mr. Justice Harlan spoke of "general regulatory statutes, *not intended to control the content of speech* but incidentally limiting its unfettered exercise, [which] have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests . . . " (Emphasis added.) The ordinances under review in the present case do not fit this description.

This court is keenly aware of the serious problems created in the major cities of the country by the deterioration of established neighborhoods. We are particularly sensitive to the problems of Detroit, the largest city within this Circuit. In holding that the two ordinances under review are unconstitutional, we do not suggest that the City of Detroit is powerless to deal with its urban problems. On the contrary, we urge it to heed the advice of Mr. Justice Marshall in his dissent in *Village of Belle Terre* v. *Boraas, supra*, where he stated, "I would find the challenged

ordinance unconstitutional. But I would not ask the village to abandon its goal of providing quiet streets, little traffic, and a pleasant and reasonably priced environment in which families might raise their children. Rather, I would commend the town to continue to pursue those purposes but by means of more carefully drawn and evenhanded legislation." 416 U.S. at 20.

The judgment of the district court is reversed for entry of a declaratory judgment that the two ordinances considered herein are invalid under the equal protection clause of the Fourteenth Amendment, and for further proceedings consistent therewith. Costs to the appellants.

CELEBREZZE, Circuit Judge, dissenting.

In 1962 the City of Detroit decided to take action against the creation of "skid row" areas by providing that no more than one of certain types of businesses could thereafter locate within 1000 feet of another. The "designated uses" so regulated included bars, hotels, pawnshops, billiard halls, second-hand stores, taxi dance halls, and other establishments which in proximity to each other gave areas a "skid row" appearance and thereby contributed to the decline of nearby residential communities.

Ten years later the City added four other businesses to the list of "designated uses"—adult book stores, adult motion picture theaters, adult mini motion picture theaters, and group "D" cabarets. The ordinance currently under attack requires that no more than two of these businesses be located within 1000 feet of each other. Pre-existing businesses are not affected, and waiver of the limitation can be obtained upon proof that a business's entry into a

neighborhood will not have the effect the ordinance was designed to prevent.[1]

Appellants filed suit in order to establish adult motion picture and mini motion picture theaters in certain areas of Detroit where the 1000-foot provision would bar their location. The District Court struck down a more restrictive section of the zoning code which is found to be "an almost total ban on uses conceded by the Defendants to be lawful." That ruling has not been appealed.

The District Court upheld the 1000-foot provision. It found that this section was "no greater than is essential to the furtherance of a legitimate governmental interest in preserving and stabilizing neighborhoods," and that it imposed only a "slight" and "incidental" burden on First Amendment rights.

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[1] The majority's opinion includes citations of the relevant portions of the ordinance under attack, except for the waiver provision, which is as follows:

"Section 66.0101.

The Commission may waive this locational provision for Adult Book Stores, Adult Motion Picture Theaters, Adult Mini Motion Picture Theaters, Group "D" Cabarets, hotels or motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, or taxi dance halls if the following findings are made:

a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.

b) That the proposed use will not enlarge or encourage the development of a 'skid row' area.

c) That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any program of urban renewal.

d) That all applicable regulations of this Ordinance will be observed."

The majority's opinion reverses this holding and renders Appellants free to locate their businesses without the interference of the challenged ordinance.

I believe that the Detroit ordinance[2] before us is a legitimate exercise of the City's police power. The plight of our cities requires that public officials have tools adequate to prevent their decline and collapse as centers of life and work. It was recognition of the need for a powerful, flexible means of coping with the complexities of urban growth which led the Supreme Court in 1926 to reject the challenge of private property owners to the very concept of zoning:

> Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the

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[2] The sole provision before us is the 1000-foot prohibition, barring the location of new adult businesses within 1000 feet of another use designated under section 66.1000.

meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

• • • • •

[T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. [Citation omitted.] A nuisance may be merely a right thing in the wrong place, — like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.

Village of Euclid v. *Ambler Realty Co.*, 272 U.S. 365, 386-87, 388 (1926).

A municipality's right reasonably to regulate uses of private property, in a manner consistent with the reach of its police power, has become ingrained in our law. Zoning may be based on values which are

> spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman v. *Parker*, 348 U.S. 26, 33 (1954).

As stated most recently in *Village of Belle Terre* v *Boraas*, 416 U.S. 1, 8 (1974), a zoning ordinance is

> economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the equal protection clause if the law be 'reasonable, not arbitrary,' [Citation omitted] and bears ' a rational relationship to a [permissible] state objective.' . . .
>
> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

The City of Detroit has exercised its police powers to maintain its neighborhoods, if not as sanctuaries, at least as liveable habitats. It has attempted to prevent its neighborhoods from being overrun and dominated by "adult" business which bring crime in their wake and destroy residential qualities. The purpose of the 1000-foot provision was expressed in an affidavit of a qualified sociologist and Detroit councilman, Melvin Ravitz:

> The ordinance in question seeks to restrict the concentration of the specified uses on the ground that any such concentration is an actual danger sign in a residential neighborhood. It is such a threat in that it leads people to believe the neighborhood is declining and more of the kind of people who accept a declining neighborhood will flock there. This process hastens the reality of neighborhood decline.

Designated uses *in concentration* create a "skid row" atmosphere. Detroit's Common Council determined, and the zoning ordinances were amended to prevent this from recurring.[3]

As Appellants argue, the 1000-foot provision has an impact on their ability to market films which are not obscene, thereby affecting First Amendment rights. The test for an ordinance which affects First Amendment rights was succinctly stated in *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968):

> [A] governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

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[3] The Ravitz affidavit vividly describes the evils which attend the development of "adult" skid-row areas. Other affidavits provide ample support for Detroit's method of combatting neighborhood decay. As one qualified journalist put it,

> "The real battle is with the criminalization of the sex business.
>
> What follows commercial pornography, which is the meat of the material offered by "adult" businesses, is prostitution. What follows prostitution is street crime, and what follows the crime reports is the demoralization of the legitimate businessmen and the drying up of the tax bases of our cities."

A Detroit City Plan Commission expert amplified this sentiment:

> "Aside from the deleterious appearance usually associated with this type of area, numerous social problems are also generated by "skid rows". These include the alcoholic, the drug addict, prostitution, crime, low rent housing for the single adult attracting senior citizens on a fixed income, the mission church, food kitchens, panhandlers, and generally an assembly point for all the human derelicts of society."

The majority and I agree that the ordinance is within Detroit's police power and that it furthers a compelling public interest — the preservation of urban neighborhoods.

We part ways over the last two hurdles of the *O'Brien* test.

The majority finds that the ordinance violates the equal protection clause by classifying films and printed materials on the basis of their content. In other words, the majority holds that Detroit's interest in preserving urban neighborhoods is not "unrelated to the suppression of free expression."

I do not view the 1000-foot provision as a regulation of speech on the basis of its content. Rather, it is a regulation of the right to locate a business based on the side-effects of its location. The interest in preserving neighborhoods is not a subterfuge for censorship.

In *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972), on which the majority relies for its *per se* ban of regulation based on content,[4] the content of speech

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[4] The majority interprets *Mosley* to mean that no distinctions at all may be made between different categories of speech. Not even Mr. Justice Marshall, whose *Belle Terre* dissent is invoked, goes this far. His dissent in that case was based on the belief that fundamental rights were affected and that *Belle Terre* had been both under- and over-inclusive in its attempt to accomplish admittedly valid objectives. Mr. Justice Marshall's dissent reiterates the fourth part of the *O'Brien* test: "[O]nce it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden." 416 U.S. at 18. Had the distinction made by *Belle Terre* between unrelated persons and family members met this test, Mr. Justice Marshall would have upheld it, despite its distinguishing between persons on the basis of what are in his view

(continued on next page)

was the sole basis for the City's action. The *Mosley* ordinance forbade peaceful picketing near a school unless the picket's subject was a labor dispute. Furthermore, the *Mosley* ordinance was not a mere regulation of the right to picket, but was an absolute ban on picketing near schools, unless the picketing was labor-related.

This is not our case. The City of Detroit has not imposed an outright or *de facto* ban on adult establishments. As the District Court found, adult establishments may locate in "myriad locations in the City of Detroit" under the 1000-foot provision. It is only their concentration that is forbidden. The ordinance is, accordingly, a "time, place and manner" regulation, which the courts have consistently upheld. *Grayned* v. *City of Rockford,* 408 U.S. 104, 115 (1972); *Cox* v. *New Hampshire,* 312 U.S. 569, 576 (1941).

The basis for this regulation, furthermore, is not a desire on the City's part to censor the materials offered by such establishments. Rather, the ordinance is solicitous of the needs of adult businesses, as the Ravitz affidavit makes clear:

> Were they the sort that could flourish under conditions of concentration, then, indeed, we would seek to house all of them in one or two sections of the City. They are not, however, uses of this sort; like other

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(*continued from preceding page*)

constitutionally protected associations. An ordinance may utilize what on the surface appears to be a distinction based on content if the basis for the distinction rests on concerns unrelated to the suppression of constitutional rights. The basic question is whether the method chosen is "necessary to promote a compelling state interest," *Union Free School District,* 395 U.S. 621, 627 (1969). *See also Dunn v. Blumstein,* 405 U.S. 330 (1972); *Schuttlesworth v. City of Birmingham,* 394 U.S. 147 (1969).

> commercial uses, they require proximity to residential areas and access to a suitable market. For this reason we cannot apply the usual zoning approach to them.

The ordinance goes out of its way not to bar these businesses from a convenient market. Its purpose is, rather, to prevent the breakdown of neighborhoods caused by undue concentrations of these businesses. If non-adult bookstores and theatres contributed to neighborhood blight in the same way that adult businesses do, the City would, no doubt, include them as designated uses under the ordinance, just as shoe-shine parlors and bars are included.

It is not a control on the basis of content in which the City of Detroit is engaging. It is, instead, a justifiable distinction in neighborhood impact that underlies the differential treatment between adult and non-adult businesses. This amply distinguishes our case from *Mosley,* where the City was unable to justify a differential treatment of peaceful labor picketing and peaceful non-labor picketing. The only conceivable reason for the difference in *Mosley* was that the City sought "to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley,* 408 U.S. at 95. That is not the purpose of Detroit's ordinance.

I am convinced that the Detroit ordinance clears the fourth and final hurdle of *O'Brien* as well—that "the incidental restriction on alleged First Amendment freedoms [be] no greater than is essential to the furtherance of [Detroit's] interest" in preserving neighborhoods.

Detroit has provided that no more than two designated uses may locate within 1000 feet of each other. This insures that adult businesses are able to locate in many

places in the City and that residents have convenient access to their offerings. Thus, publishers and consumers of adult materials are not significantly affected by the ordinance. It is only the businessmen who seek to make a larger profit out of operating adult businesses by locating near similar enterprises who suffer. The effect of the ordinance, therefore, is to prevent a concentration of adult businesses in any area of the City but not to stifle the flow of commerce between distributors and the public.

The majority suggests that the City could devise a less restrictive and even-handed method of furthering its objective. It suggests no less restrictive alternative, however, and I can see none. If Detroit is to prevent its neighborhoods from turning into sex-oriented skid rows, catering to the tastes of only one stratum of society and driving out stable residential populations, it must be allowed to limit the number of adult establishments in any area of the City. That is what the 1000-foot provision seeks to do.

Nor does the majority suggest a feasible, more even-handed approach. It suggests that Detroit could legally accomplish its goals by requiring *all* bookstores and theaters to locate in enclaves within the City or by restricting their hours of operation. Neither solution would serve the purpose of preventing concentrations of "adult" businesses. Indeed, the first suggested solution would accomplish precisely what Detroit seeks to prevent. Both solutions, furthermore, would impose restrictions on non-adult bookstores and theaters that have no relation to any demonstrated legitimate public purpose. Thus, they would run afoul of the first two parts of the *O'Brien* test. The majority's call for "even-handed" legislation would suggest that it considers adult and non-adult bookstores and theaters to pose similar threats to the stability of neighborhoods.

The record in this case belies this conclusion and establishes the legitimate reasons for treating adult establishments in the same manner as pool rooms and bars, without treating non-adult theaters and bookstores similarly.

I too am vigilant to protect our First Amendment freedoms. They must not be eroded out of misguided good intention. The First Amendment, however, was not intended to be the death-knell of cities. Detroit has carefully attempted to prevent its neighborhoods from becoming sex-oriented, crime-ridden wastelands, without unduly infringing the public's right to buy and the publisher's right to distribute non-obscene materials. The First Amendment does not condemn this effort.

It seems to me that if we are to prevent our cities from becoming uninhabitable jungles, we must, within constitutional safeguards, restore to our cities the right of self-government.

I find the zoning is a proper exercise of the police powers of the City of Detroit and would affirm the District Court's findings and Judgment.

APPENDIX B

JUDGMENT

U. S. COURT OF APPEALS—SIXTH CIRCUIT

(Filed June 16, 1975)

American Mini Theatres, Inc., a Michigan corporation, and Pussy Cat Theatres of Michigan, Inc., a Michigan corporation, Plaintiffs-Appellants, v. Roman Gribbs, Mayor of the City of Detroit, et al., Defendants-Appellees.	No. 74-2129

Before: EDWARDS, CELEBREZZE and LIVELY, Circuit Judges.

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed for entry of a declaratory judgment that the two ordinances considered are invalid under the equal protection clause of the Fourteenth Amendment, and for further proceedings.

It is further ordered that Plaintiffs-Appellants recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered By Order Of The Court

/s/ John P. Hehman
Clerk

Issued as Mandate:

COSTS:

Filing fee .....$_____
Printing $_____
Total $_____

APPENDIX C

ORDER STAYING MANDATE

U. S. COURT OF APPEALS—SIXTH CIRCUIT

(Filed July 18, 1975)

Nos. 74-2129 & 74-2303

AMERICAN MINI THEATRES, INC., ET AL.,
Plaintiffs-Appellants,
v.
ROMAN GRIBBS, ET AL.,
Defendants-Appellees.

BEFORE: EDWARDS, CELEBREZZE AND LIVELY, Circuit Judges.

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Entered By Order Of The Court

John P. Hehman, Clerk
By: /s/ Grace Keller
Chief Deputy

APPENDIX D

OPINION

U. S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

(Filed March 25, 1974)

Nortown Theatre, Incorporation, a body corporate of the State of Michigan,
Petitioner,
vs.
Roman Gribbs, Mayor of the City of Detroit,
John Nichols, Police Commissioner of The Detroit Police Department,
Michael Glusak, Corporation Counsel of the City of Detroit,
Creighton Lederer, Acting Commissioner of the Department of Building & Safety Engineering for the City of Detroit,
Charles A. Blessing, Director-Secretary of the City Planning Commission, jointly and severally,
Defendants,

Civil Action No. 39796

Variety Books, Incorporated, a Michigan Corporation,

Petitioner,

vs.

Roman Gribbs, Mayor of the City of Detroit,
John Nichols, as Police Commissioner of The Detroit Police Department,
Michael Glusak, Corporation Counsel of the City of Detroit,
Creighton Lederer, Acting Commissioner of the Department of Building & Safety Engineering for the City of Detroit,
Charles A. Blessing, Director-Secretary of the City Planning Commission, jointly and severally,

Defendants.

Civil Action No. 40168

American Mini Theatres, Inc., a Michigan corporation and
Pussy Cat Theatres of Michigan, Inc., a Michigan corporation,

Plaintiffs,

vs.

Roman Gribbs, Mayor of the City of Detroit,
John Nichols, Police Commissioner of The Detroit Police Department,
Michael Glusak, Corporation Counsel of the City of Detroit,
Creighton Lederer, Acting Commissioner of the Department of Building & Safety Engineering for the City of Detroit,
Charles A. Blessing, Director and Secretary,

Defendants.

Civil Action No. 40198

The three above-captioned civil actions present substantially identical challenges to the constitutionality of certain ordinances of the City of Detroit. For purposes of the motions for summary judgment filed in each case by the Defendants, the cases shall be treated together in this opinion.

AMERICAN MINI THEATRES, INC., and PUSSY CAT THEATRES OF MICHIGAN, Plaintiffs in Civil Action No. 40198, are owners and lessees of a motion picture theatre in the City of Detroit which is devoted to the showing of so-called adult films from which minors are excluded. They have been denied a certificate of occupancy

for their theatre by the City of Detroit, by reason of the provision of its Ordinances 742-G and 743-G.

NORTOWN THEATRE, INC., Plaintiff in Civil Action No. 39796, operates a movie theatre of the same character, also in the City of Detroit. It received a letter on March 9, 1973 from the Corporation Counsel of the City of Detroit advising that the theatre was in violation of provisions of the same Ordinances. The letter warned that, unless the theatre complied with the Ordinances, proceedings to enjoin its operation would be brought.

VARIETY BOOKS, INC., Plaintiff in Civil Action No. 40168, operates a retail bookstore in the City of Detroit which is devoted to the sale of so-called "adult books" to adult customers only. It has been denied a change in occupancy permit and has been threatened with legal proceedings to enjoin its operation by the City of Detroit by reason of the provisions of Ordinance 742-G.

The Plaintiffs in each case assert that these city Ordinances violate their Constitutional rights under the First and Fourteenth Amendments of the Federal Constitution because their language is so vague as to deny due procsss of law; because they fail to establish procedural safeguards; because they invade the area of protection guaranteed by the First Amendment; and because they deprive Plaintiffs of equal protection of the law afforded to other theatre operators and bookstores. Plaintiffs seek declaratory and injunctive relief.

Defendants have moved for summary judgment under Rule 56(b) of the Federal Rules of Civil Procedure on the grounds that Plaintiffs' complaint fails to state a claim against Defendants upon which relief can be granted. An affidavit of Dr. Mel Ravitz, a sociologist at Wayne State

University, located in Detroit, and a former member of the Common Council of the City of Detroit, was filed in support of the motions. Much of the information contained in the affidavit was presented to the Corporation Counsel of the City of Detroit for consideration by him and by the Common Council of the City of Detroit at the time the Ordinances were enacted. See Dr. Ravitz' letter of October 17, 1962 attached to Defendants' motions. The affidavit recites some sociological reasons for regulating the locations of businesses of the type operated by Plaintiffs.

Ordinances 742-G and 743-G regulate the location of certain types of businesses in the City of Detroit. These include three so-called adult businesses; adult bookstores, adult motion picture theatres (including adult mini motion picture theatres), and Group D cabarets (a cabaret which features topless dancers, et cetera. They also include establishments for the sale of beer and liquor, hotels, motels, pawnshops, pool or billiard halls, public lodging houses, second hand stores, shoeshine parlors and taxi dance halls. The present Ordinances amend or replace earlier Ordinances regulating many of these same businesses, but not adult motion picture theatres or adult bookstores. The purpose of the Ordinances, as stated therein, is to ensure that the adverse effects of such businesses, particularly when several are concentrated in a certain area, will not contribute to the blighting or downgrading of surrounding neighborhoods (see prefatory language of Ordinance 742-G, Section 66.0000). Before enacting these Ordinances, the Common Council had the expert opinion of Dr. Ravitz, referred to above, on the effect on neighborhoods of concentrations of businesses of the sort regulated. Their effect is deleterious, he stated. They attract the kinds of people who frequent these places and drive away those

who do not. This contributes to the decline of a neighborhood. A concentration of such businesses also causes the neighborhood to appear to be declining and this causes a lack of neighborhood pride, resulting in a further decline. Nor is it possible to set aside certain areas where these business uses are to be concentrated, as is done with industrial uses, since the businesses, like other commercial uses, must have some proximity to residential areas and access to a suitable market.

The Ordinances provide two limitations on the location of any businesses of this character; i.e., the regulated uses. The Ordinances prohibit more than two such uses within 1000 feet of one another; and, in the case of adult theatres and adult bookstores, as well as Class D cabarets, prohibit their location within 500 feet of a residential dwelling or rooming unit. In the case of each of these restrictions, there is a provision for waiver. With respect to the 1000-foot requirement, the Ordinances provide:

> Section 66.0101.
>
> The Commission may waive this locational provision for Adult Book Stores, Adult Motion Picture Theaters, Adult Mini Motion Picture Theaters, Group "D" Cabarets, hotels or motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, or taxi dance halls if the following findings are made:
>
> a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.
>
> b) That the proposed use will not enlarge or encourage the development of a "skid row" area.

> c) That the establishment of an additional regulated use in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any program or urban renewal.
>
> d) That all applicable regulations of this Ordinance will be observed.

The 500 feet from aresidential dwelling on rooming unit prohibition may be waived:

> . . . if the person applying for the waiver shall file with the City Plan Commission a petition which indicates approval of the proposed regulated use by 51 per cent of the persons owning, residing or doing business within a radius of 500 feet of the location of the proposed use, ...

The petitioner is required to attempt to contact all eligible locations within this 500-foot radius, and must maintain a list of all addresses at which no contact was made. The Commissioner of the Department of Buildings and Safety Engineering is authorized to adopt rules governing the procedure for securing petitions. The Ordinances define adult theatres on the basis of the type of films shown therein and adult bookstores on the basis of the type of books in their stock in trade.

Defendants assert that the Ordinances are not vague, that the classifications bear a rational relationship to a State objective and that there is a compelling State interest for enacting them.

The right of the City of Detroit to reasonably regulate and restrict the location of certain uses, whether business, residential or industrial, is clear; e.g., *Euclid* v. *Ambler Co.*,

272 U.S. 365 (1926). Plaintiffs concede this general proposition but assert that the Ordinances here, when applied to them, are invalid. Defendants' purpose in enateing them, say Plaintiffs, is not to protect neighborhoods from deleterious business but, rather, is for the purpose of preventing the showing of certain types of films and the sale of certain types of books. It is not for this Court to look behind the stated reasons for enacting the Ordinances. As the United States Supreme Court held in *United States* v. *O'Brien*, 391 U.S. 367 (1967):

> It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive. As the Court long ago stated:
>
> "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray* v. *United States*, 195 U.S. 27, 56 (1904).
>
> This fundamental principle of constitutional adjudication was reaffirmed and the many cases were collected by Mr. Justice Brandeis for the Court in *Arizona* v. *California*, 283 U.S. 423, 455 (1931). [391 U.S. at p. 283.]

When, as here, the City has stated a reason for adopting an ordinance which is a subject of legitimate concern, that statement of purpose is not subject to attack.

Nor may the Court substitute its judgment for that of the Common Council of the City of Detroit as to the methods adopted to deal with the City's legitimate concern to

preserve neighborhoods, so long as there is some rational relationship between the objective of the Ordinance and the methods adopted.

It is the claim of Plaintiffs that the provisions of the Ordinances that define adult theatre, adult mini theatre, and adult bookstores are vague. The Ordinances, however, carefully and specifically describe the type of material categorized as "adult". Adult Motion Picture Theaters are defined as those presenting material "distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specified Sexual Activities' or 'Specified Anatomical Areas' ". Adult Book Stores are defined as those having "a substantial or significant portion" of their stock in trade in materials which are "distinguished or characterized by an emphasis on matter depicting, describing or relating to 'Specific Sexual Activities' or 'Specific Anatomical Areas' ". These terms are each described in specific detail. Plaintiffs do not point out just what is vague about the above language. The words "distinguished" or "disttinguishing" are frequently used in statutes relating to ballots. See, *Words and Phrases* "Distinguished Ballot", "Distinguishing Mark". The word "characterized" has not, so far as the Court can determine, had similar judicial construction. However, "charactetristic" or "characteristic of" appear in various workmen's compensation statutes in which an injury must be characteristic of a business of the employer in order to be compensable as an occupational disease. E.g., *Carter* v. *International Detrola Corp.*, 328 Mich 367 (1950). The word causes no problem in such a statute nor should it here. See also, *Lever Bros. Co.* v. *Proctor & Gamble Mfg. Co.*, 49 F. Supp. 443 (D.C. Md., 1943). Similarly, the word "substantial" as used in the definition of Adult Book Store is not so indefinite as to render the Ordinance void and unenforceable. That term

had been construed as having an ascertainable meaning in numerous statutory schemes. See, e.g. *Busch* v. *Service Plastics, Inc.,* 261 F. Supp. 136, 141 (N.D. Ohio 1966); *Roop* v. *Richardson,* 324 F. Supp. 1130 (W.D. Va. 1971); *State ex rel Saveland Park Holding Corp.* v. *Wieland,* 69 NW 2d 217, 224.

Plaintiffs claim that the Ordinances are unconstitutional because the waiver provisions are vague and overbroad and improperly delegate authority to the City Plan Commission. Plaintiffs urge that, if they meet all of the conditions for waiver, the City Plan Commission need not waive the prohibition. The Ordinances may be construed, however, so that the word "may", in the provision that if certain conditions are met the City Plan Commission "may" waive the location prohibitions, is mandatory. The Michigan Supreme Court has not construed these Ordinances nor has any Michigan Court construed these waiver provisions. However, it is a sound rule of construction that statutes or ordinances should be construed so as to be valid and constitutional if this can be done. This Court believes that the Michigan Court will construe the word "may" to mean "shall" in the waiver provisions of these Ordinances. In the early case of *McBrian* v. *City of Grand Rapids,* 56 Mich 95 (1885), a statute provided that the Board of Public Works should vote for sealed proposals and "may" contract with the lowest reasonable bidder. The Michigan Supreme Court construed the word "may" as if it meant "shall". In *Smith* v. *City Commission,* 281 Mich 235 (1937), the Michigan Supreme Court quoted, with approval, from *Corpus Juris,* saying:

> "A mandatory construction will usually be given to the word 'may' where public interests are concerned, and the public or third persons have a claim *de jure* that the power conferred should be exercised,

> or whenever something is directed to be done for the sake of justice or the public good; but never for the purpose of creating a right." 59 C.J. pp. 1082-1085. [281 Mich at p. 243]

Plaintiffs conceded that the word "may" is frequently construed as mandatory but point to the fact that the present Ordinance elsewhere uses the word "shall". However, where, as here, specific standards are set up under which the waiver "may" be made, it is fair construction that the waiver must be granted if all of the conditions are met.

The State's right to require that particular businesses be located at specified distances to one another has been approved in a number of zoning cases. *O'Connor et al* v. *Board of Zoning Appeals,* 140 Conn 65, 98 Atl. 2d 515; *Glackman* v. *City of Miami Beach,* 51 S. 2d 294.

Nor is there any due process or any other constitutional violation in requiring 51 per cent of adjacent property owners to consent to a regulated use before permitting waiver. This question was before the United States Supreme Court in *Thomas Cusack Co.* v. *City of Chicago,* 242 U.S. 526 (1917). The City of Chicago, by ordinance, prohibited erection of billboards in any block in which one-half of the buildings were used exclusively for residence purposes without first obtaining the consent in writing of owners of a majority of the frontage of property on both sides of the street. The plaintiffs there claimed that the ordinance was invalid because it delegated legislative power to the property owners. The Court held that the ordinance was a reasonable exercise of the State's police power since:

> . . ., much evidence was intorduced upon the trial of the case, from which the Supreme Court finds that fires had been started in the accumulation of com-

bustible material which gathered about such billboards; that offensive and unsanitary accumulations are habitually found about them, and that they afford a convenient concealment and shield for immoral practices, and for loiterers and criminals. [242 U.S. at p. 529]

These factors were:

> . . . sufficient to convincingly show the propriety of putting billboards, as distinguished from buildings and fences in a class by themselves . . . and to justify the prohibition against their erection in [a residential section of a city] in the interest of safety, morality and decency of the community. [242 U.S. at pp. 529-530]

With respect to the waiver provisions, the United States Supreme Court stated:

> The plaintiff in error cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute. He who is not injured by the operation of a law or ordinance cannot be said to be deprived by it of either constitutional right or of property . . .. To this we may add that such a reference to a neighborhood of the propriety of having carried on within it trades or occupations, which are properly the subject of regulation in the exercise of the police power, is not uncommon in laws which have been sustained against every possible claim of unconstitutionality, such as the right to maintain saloons, *Swift* v. *People*, 162 Illinois, 534, and as to the location of garages, *People* v. *Ericsson*, 263 Illinois, 368. Such treatment is plainly applicable to offensive structures. [242 U.S. 529 at p. 530]

The Court distinguished the case where the establishment of the standards is given to property owners as in *Eubank* v. *Richmond*, 226 U.S. 137 (1912). It said:

> A sufficient distinction between the ordinance there considered and the one at bar is plain. The former left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave to it the effect of law. The ordinance in the case at bar abcolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances. [242 U.S. at p. 531]

The requirement of consent to a waiver by a percentage of the adjoining property owners is not a device unique to the instant Ordinance. It is relatively common in zoning or licensing of deleterious businesses. *People* v. *Gottlieb*, 337 Mich 276 (1935), a used-car business; *Cady* v. *City of Detroit*, 289 Mich 499 (1939), a trailer camp.

Plaintiffs assert that the different treatment afforded adult theatres and bookstores, as opposed to theatres and bookstores, generally, denies them the equal protection of the law. The equal protection clause, of course, does not require that all persons or all businesses be treated the same. "Sometimes the grossest discrimination can lie

in treating things that are different as though they were exactly alike . . . " *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971). What is required is that the differing treatment be properly justified.

Because the Ordinances distinguish adult theatres and bookstores from ordinary theatres and bookstores on the basis of the content of their respective wares, the classification is one which restrains conduct protected by the First Amendment. See *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676 (1968). The appropriate standard for reviewing the classification, therefore, is a test of close scrutiny. *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 670 (1966); *NAACP* v. *Button*, 371 U.S. 415, 438 (1963). Under this test, the validity of the classification depends on whether it is necessary to further a compelling State interest.

The compelling State interest which the Defendants point to as justifying the restrictions on locations of adult theatres and bookstores is the preservation of neighborhoods, upon which adult establishments have been found to have a destructive impact. The affidavit of Dr. Mel Ravitz clearly establishes that the prohibition of more than one regulated use within 1000 feet is necessary to promote that interest. This provision therefore does not offend the equal protection clause.

However, no arguments are advanced by Defendants as to how the prohibition of the regulated uses within 500 feet of a single dwelling or rooming unit furthers the legitimate interest the City has in preserving a residential area or neighborhood. Indeed, where only a single dwelling or rooming unit is involved, we fail to see how the prohibition of the Ordinance affords any protection whatsoever to a neighborhood or residential area.[1] We must weigh this imperceptible benefit to the City's stated interest against the severe impact imposed by the Ordinance on the Plaintiffs. No area of the City is specifically set aside or designated for the regulated uses. There are few, if any, locations other than industrial areas and the downtown commercial area of Detroit where there is not a single dwelling or living unit within 500 feet. Thus, the effect of the restriction is an almost total ban on uses conceded by the Defendants to be lawful. While such an extreme effect might not render the restriction invalid under the equal protection clause if the City had demonstrated that its compelling interest was promoted thereby, no such showing has here been made. We conclude that the 500-foot restriction is not necessary to promote any expressed compelling State interest and is therefore invalid under the equal protection clause.

Plaintiffs' principal attack upon the Ordinances is their effect on First Amendment rights. Defendants respond that the Ordinances do not limit or restrict in any way what may be shown in licensed adult theatres or sold in adult bookstores. The nature of the material is of concern only as it relates to whether the location is to be regulated under the Ordinances. The Ordinances do not affect the operation of existing establishments but only the location of new ones. There are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight.

The Ordinances in the instant case prevent certain conduct, namely the operation of certain theatres and book-

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[1] In this respect, the instant case differs from those such as *Cady* when at least 50 per cent of the defined area was residential.

stores. In doing so, they also, of course, have the effect of circumscribing speech. There may be, however, some regulation even of "pure speech". Even the press, like any other business, can be regulated on business and economic matters. See *Associated Press* v. *United States,* 326 U.S. 1, in which the Associated Press was held accountable for violations of the antitrust laws. In the same tenor are cases upholding the application of wage and hour laws and other labor laws to employers and employees of newspapers or other enterprises protected by the First Amendment. Where there is a sufficiently important governmental interest in regulating the non-speech element of conduct or of a business, incidental regulations on First Amendment freedoms may be justified. Thus, the United States Supreme Court has upheld the authority of governmental units to regulate picketing, *Shuttlesworth* v. *Birmingham,* 394 U.S. 147 (1969); the activities of lobbyists, *United States* v. *Harriss,* 347 U.S. 615 (1954); the operation of sound trucks, *Kovacs* v. *Cooper,* 336 U.S. 77 (1949); activities near a school, *Grayned* v. *Rockford,* 408 U.S. 104 (1972).

The standards or criteria which must be met to justify governmental regulation where speech and non-speech elements are combined in the same course of conduct are set forth in *United States* v. *O'Brien, supra,* where the Court said:

> This Court has held that when "speech" and "non-speech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the qualify of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.
> [391 U.S. at p. 376-377]

Applying those standards to the instant case, the power to license and zone businesses and prohibit their location in certain areas is clearly within the constitutional power of the City. The government interest, i.e. the preservation and stablization of neighborhoods in the City of Detroit, is unrelated to the suppression of free expression. First Amendment rights are indirectly related, but only in the sense that they cannot be freely exercised in specific locations. Plaintiffs would not contend that they are entitled to operate a theatre or bookstore, which are commercial businesses, in a residentially zoned area; nor could they claim the right to put on a performance for profit in a public street. Admittedly the regulation here is more restrictive, but it is of the same character.

The City of Detroit has a substantial governmental interst in protecting and maintaining the character of residental neighborhoods. This interest is furthered by the prohibition against more than one regulated use within 1000 feet of one another. As stated above, in connection with analysis of the Ordinances under the equal protection clause, the City's interest is not furthered by the prohibition of a regulated use within 500 feet of a *single* dweiling

or rooming unit. Similarly, while the restriction on First Amendment freedoms, in the case of the 1000-foot prohibition, is no greater than is essential to the furtherance of a legitimate governmental interest in preserving and stabilizing neighborhoods, the same cannot be said of the 500-foot prohibition. In prohibiting regulated uses within 500 feet of a single dwelling or living unit, the Ordinance imposes a greater incidental restriction on First Amendment freedoms than is essential to preserve and stablize residential neighborhoods.

For the foregoing reasons, those portions of the Ordinances which relate to the prohibition against two or more regulated uses within 1000 feet are declared to be valid; those portions which prohibit such uses within 500 feet of a dwelling unit are declared invalid.

Appropriate declaratory judgments may be presented.

/s/ CORNELIA G. KENNEDY
U. S. District Judge

/s/ LAWRENCE GUBOW
U. S. District Judge

Dated: March 22, 1974

APPENDIX E

ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Nortown Theatre Incorporated, a body corporate of the State of Michigan, Petitioner, vs. Roman Gribbs, Mayor of the City of Detroit, John Nichols, lice Commissioner of the Detroit Police Department, Michael Glusak, Corporation Counsel of the City of Detroit, Creighton Lederer, Acting Commissioner of the Department of Buildings & Safety Engineering for the City of Detroit, Charles A. Blessing, Director-Secretary of the City Planning Commission, jointly and severally, Defendants.	No. 39796

At a session of said Court, held in the Federal Building, City of Detroit, Michigan, on Apr 25, 1974.

PRESENT: Honorable LAWRENCE GUBOW, U.S. District Judge.

This matter having come before this Court on Complaint for Declaratory Judgment in the above captioned case challenging the constitutionality of Detroit Ordinances No. 742-G (particularly Sections 5-2-1.1 and 5-2-1.2) and 743-G (particularly Sections 32.0007, 66.0000, 66.0101, 66.0103, 94.0300 and 95.0300); Memoranda of Law having been submitted by counsel for the respective parties, and having heard oral argument on behalf of all parties; this Court being fully advised in the premises and having filed a written Opinion, the contents of which are incorporated herein by reference, and having directed that Judgment be entered in accordance therewith now, therefore,

IT IS ORDERED AND ADJUDGED as follows:

1. Those portions of Ordinances No. 742-G and 743-G which relate to the prohibition of two or more "regulated uses" within one thousand feet (1000) of one another, are declared valid.

2. Those portions of Ordinances No. 742-G and 743-G which prohibit "regulated uses" within five hundred feet (500) of a dwelling unit are declared invalid.

LAWRENCE GUBOW
U. S. District Judge

APPENDIX F

JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

American Mini Theatres, Inc., a Michigan corporation, and Pussy Cat Theatres of Michigan, a Michigan corporation, Petitioner, vs. Roman Gribbs, Mayor of the City of Detroit, John Nichols, Police Commissioner of the Detroit Police Department, Michael Glusak, Corporation Counsel of the City of Detroit, Creighton Lederer, Acting Commissioner of the Department of Buildings & Safety Engineering for the City of Detroit, Charles A. Blessing, Director-Secretary of the City Planning Commission, jointly and severally, Defendants.	No.40198

At a session of said Court, held in the Federal Building, City of Detroit, Michigan, on May 20 1974.

PRESENT: Honorable CORNELIA G. KENNEDY, U.S. District Judge.

This matter having come before this Court on Complaint for Declaratory Judgment in the above captioned case challenging the constitutionality of Detroit Ordinances No. 742-G (particularly Sections 5-2-1.1 and 5-2-1.2) and 743-G (particularly Sections 32.0007, 66.0000, 66.0101, 66.0103, 94.0300 and 95.0300); Memoranda of Law having been submitted by counsel for the respective parties, and having heard oral argument on behalf of all parties; this Court being fully advised in the premises and having filed a written Opinion, the contents of which are incorporated herein by reference, and having directed that Judgment be entered in accordance therewith now, therefore,

IT IS ORDERED AND ADJUDGED as follows:

1. Those portions of Ordinances No. 742-G and 743-G which relate to the prohibition of two or more "regulated uses" within one thousand feet (1,000) of one another, are declared valid.

2. Those portions of Ordinances No. 742-G and 743-G which prohibit certain "regulated uses" within five hundred feet (500) of a dwelling unit are declared invalid.

CORNELIA G. KENNEDY
U. S. District Judge

APPENDIX G

ORDINANCE NO. 742-G

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

Section 1. That Ordinance No. 390-G, entitled: "An Ordinance to establish districts in the City of Detroit; to regulate the use of land and structures therein, to regulate and limit the heighth, the area, the bulk and location of buildings; to regulate and restrict the location of trades and industries and the location of buildings designed for specified uses; to regulate and determine the area of yards, courts and other open spaces; to regulate the density of population; to provide for the establishment of a program to develop and upgrade the appearance of places of businesses or other establishments and to provide a local assessment district for the payment of the cost of such improvements according to the benefits to be derived therefrom; to provide for the administration and enforcement of this Ordinance; to provide for a Board of Appeals, and its powers and duties; and to provide a penalty for the violation of the terms thereof," as amended, be and the same is hereby amended by adding new sections to be known as Section 32.0007, 32.0023, and 66.0103 and by amending Sections 66.0000, 66.0101, 66.0102, 94.0300, 95.0300, 101.0100 and 102.0100, to read as follows:

Section 32.0007 Adult

Adult Book Store

An establishment having as a substantial or significant portion of its stock in trade, books, magazines, and other periodicals which are distinguished or characterized by

their emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below), or an establishment with a segment or section devoted to the sale or display of such material.

Adult Motion Picture Theater

An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below) for observation by patrons therein.

Adult Mini Motion Picture Theater

An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing, or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below), for observation by patrons therein.

For the purpose of this Section, "Specified Sexual Activities" is defined as:

1. Human Genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

And "Specified Anatomical Areas" is defined as:

1. Less than completely and opaquely covered: (a) human genitals, pubic region, (b) buttock, and (c) female breast below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Section 32.0023 Cabaret

Group "D" Cabaret

A cabaret which features topless dancers, go-go dancers, exotic dancers, strippers, male or female impersonators, or similar entertainers.

66.0000 Regulated Uses

In the development and execution of this Ordinance, it is recognized that there are some uses which, because of their very nature, are recognized as having serious objectionable operational characteristics, particularly when several of them are concentrated under certain circumstances thereby having a deleterious effect upon the adjacent areas. Special regulation of these uses is necessary to insure that these adverse effects will not contribute to the blighting or downgrading of the surrounding neighborhood. These special regulations are itemized in this section. The primary control or regulation is for the purpose of preventing a concentration of these uses in any one area (i.e. not more than two such uses within one thousand feet of each other which would create such adverse effects).

Uses subject to these controls are as follows:

Adult

Adult Book Store

Adult Motion Picture Theater

Adult Mini Motion Picture Theater

Cabaret

Group "D" Cabaret

Establishments for the sale of beer or intoxicating liquor for consumption on the premises.

Hotels or motels

Pawnshops

Pool or billiard halls

Public lodging houses

Secondhand stores

Shoeshine parlors

Taxi dance halls

Section 66.0101.

The Commission may waive this locational provision for Adult Book Stores, Adult Motion Picture Theaters, Adult Mini Motion Picture Theaters, Group "D" Cabarets, hotels or motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, or taxi dance halls if the following findings are made:

a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this Ordinance will be observed.

b) That the proposed use will not enlarge or encourage the development of a "skid row" area.

c) That the establishment of an additional regulated use in the area will not be contrary to any program of neighhood conservation nor will it interfere with any program of urban renewal.

d) That all applicable regulations of this Ordinance will be observed.

Section 66.0102

For establishments for the sale of beer or intoxicating liquor for consumption on the premises, the Common Council may waive the locational requirements if the findings required in Section 66.0101 (a) through (d) can be made ~~or waived for just cause~~ and after receiving a report and recommendation from the City Plan Commission.

Section 66.0103

It shall be unlawful to hereafter establish any Adult Book Store, Adult Motion Picture Theater, Adult Mini Theater or Class "D" Cabaret within 500 feet of any building containing a residential, dwelling or rooming unit. This prohibition may be waived if the person applying for the waiver shall file with the City Plan Commission a petition which indicates approval of the proposed regulated use by 51 per cent of the persons owning, residing or doing business within a radius of 500 feet of the location of the proposed use, the petitioner shall attempt to contact all eligible locations within this radius, and must maintain a list of all addresses at which no contact was made.

The Commissioner of the Department of Buildings and Safety Engineering shall adopt rules and regulations governing the procedure for securing the petition of consent provided for in this section of the ordinance. The rules shall provide that the circulator of the petition requesting a waiver shall subscribe to an affidavit attesting to the fact that the petition was circulated in accordance with the rules of the Department of Buildings and Safety Engineering and that the circulator personally witnessed the signatures on the petition and that the same were affixed to the petition by the person whose name appeared thereon.

The City Plan Commission shall not consider the waiver of locational requirements set forth in Sections 66.0000

to 66.0102 until the above described petition shall have been filed and verified.

94.0300 Permitted with Approval Uses

The following uses, and uses accessory thereto, shall be permitted by the Commission, or Council if specified, and subject to compliance with the provisions and standards as set forth in Article VI, Section 65.0000 and to all conditions hereinafter listed.

Adult

Adult Book Stores as regulated by Section 66.0000.

Adult Motion Picture Theater as regulated by Section 66.0000.

Adult Mini Motion Picture Theater as regulated by Section 66.0000.

Cabaret

Group "D" Cabaret as regulated by Section 66.0000.

Confection manufacture.

Dental products, surgical, or optical goods manufacture.

Fraternity or sorority houses.

Go-Cart tracks, subject to the following requirements, except as may be adjusted by the Commission:

a) Parking areas shall be surfaced with gravel, slag, or other comparable material and treated so as to prevent the raising of dust.

b) Ingress or egress shall be only from the principal street side of the property as may be determined by the Commission.

c) If lighting is provided, all such lighting shall be subdued, shaded, and focused away from all dwellings.

d) An opaque fence or wall of wood or masonry construction, six feet in height, shall be constructed between the approved site and any adjacent property zoned in a residential district classification. If such fence is of wood construction, the design and type of fence shall be subject to the approval of the Commission.

e) In all instances where a wall or fence is required, said wall or fence shall be protected from possible damage inflicted by vehicles using the parking area by means of precast concrete wheel stops at least six inches in height, or by firmly implanted bumper guards not attached to the wall or fence, or by other suitable barriers.

f) No part of the driving track shall be within 300 feet of property zoned in a residential district classification.

g) Any track surface or other area to be used for the operation of a go-cart shall be of an asphaltic or concrete material.

h) All light standards, poles, or other appurtenances shall be effectively padded or screened so as to prevent injury to drivers of the vehicles; baled hay or other suitable shock absorbing material shall be placed around all turns or curves in the track.

i) All vehicles shall be provided with mufflers to eliminate objectionable noise. The Commission may require a change in mufflers to reduce exhaust noises, if, in its opinion, such noise becomes a nuisance.

j) Permitted hours of operation shall be 10:00 A.M. to 10:00 P.M. Monday through Saturday, and 12:00 noon to 10:00 P.M. on Sundays.

Jewelry manufacture

Lithographing

Miniature golf courses, subject to the following requirements, except as may be adjusted by the Commission:

a) Parking areas shall be surfaced with gravel, slag, of other comparable material and treated so as to prevent the raising of dust.

b) Ingress and egress shall be only from the principal street side of the property as may be determined by the Commission.

c) If lighting is provided, all such lighting shall be subdued, shaded, and focused away from all dwellings.

d) An opaque fence or wall of wood or masonry construction, six feet in height, shall be constructed between the approved site and any adjacent property zoned in a residential district classification. If such fence is of wood construction, the design and type of fence shall be subject to the approval of the Commission.

e) In all instances where a wall or fence in required, said wall or fence shall be protected from possible damage inflicted by vehicles using the parking area by means of precast concrete wheel stops at least six inches in height, or by firmly implanted bumper guards not attached to the wall or fence, or by other suitable barriers.

f) Loudspeakers or public address systems may be used only for control purposes, shall play no music, and shall be removed if, in the opinion of the Commission, such operation constitutes a nuisance.

g) No part of the playing surface of a miniature golf course shall be located within fifty (50) feet of any property zoned in a residential district classification.

h) Permitted hours of operation shall be 8:00 A.M. to 10:30 P.M. Monday through Saturday, and 12:00 noon to 10:30 P.M. Sunday.

Motels or hotels as regulated by Section 66.0000

Motor vehicle body or fender bumping and painting shops and major motor repairing provided that all operations are conducted entirely within a building, and further provided that any wall facing, abutting, or adjacent to residentially zoned property shall consist of a solid blank wall with no openings whatsoever, excepting that a required secondary exit door, of minimum requirements, shall be permitted and provided further, that all open storage vehicles awaiting repairs or service be enclosed by an opaque wall or fence of masonry or wood construction six feet in height and maintained in a neat and orderly fashion at all times.

Multiple family dwellings, which may contain non-residential uses as specified in Article VIII, Section 86.0113.

Photoengraving

Printing or engraving shops

Public lodging houses, as regulated by Section 66.0000

Rebound tumbling centers, subject to the following requirements, except as may be adjusted by the Commission:

a) Parking areas shall be surfaced with gravel, slag, or other comparable material and treated so as to prevent the raising of dust.

b) Ingress and egress shall be only from the principal street side of the property as may be determined by the Commission.

c) If lighting is provided, all such lighting shall be subdued, shaded, and focused away from all dwellings.

d) An opaque fence or wall of wood or masonry construction, six feet in height, shall be constructed between the approved site and any adjacent property zoned in a residential district classification. If such fence is of wood construction, the design and type of fence shall be subject to the approval of the Commission.

e) In all instances where a wall or fence shall be protected from possible damage inflicted by vehicles using the parking area by means of precast concrete wheel stops at least six inches in height, or by firmly implanted bumper guards not attached to the wall or fence, or by other suitable barriers.

f) Loudspeakers or public address systems may be used only for control purposes, shall play no music, and shall be removed if, in the opinion of the Commission, such operation constitutes a nuisance.

g) No rebound tumbling apparatus or part thereof shall be located within one hundred feet of any property zoned in a residential district classification.

h) Permitted hours of operation shall be 8:00 A.M. to 10:30 P.M. Monday through Saturday, and 12:00 noon to 10:30 P.M. Sunday.

Residential uses combined in structures with permitted commercial or other uses

Restaurants, drive-in, when located on a street designated on the master plan of trafficways as a major thoroughfare, subject to the following requirements except as may be adjusted by the Commission or Council:

a) An unpierced masonry wall or opaque wood fence six feet in height shall be provided on all sides of the premises so used; provided, that in all instances where a wall or fence is required, said wall or fence shall be protected from possible damage inflicted by vehicles using the parking area by means of precast concrete wheel stops at least six inches in height, or by firmly implanted bumper guards not attached to the wall or fence, or by other suitable barriers.

b) On the side of the property abutting the access street, the above described wall or opaque wood fence may be reduced to a height of three feet six inches.

c) Wire mesh fencing not exceeding two inch mesh and made of number nine or heavier wire may be used in lieu of a masonry wall on those lot lines not adjacent to a street or alley but contiguous to property zoned in a business or industrial district classification.

d) No fence or wall shall be required on that portion of a lot line where there is a building or structure serving the purpose of a fence or wall. Any such building or structure located on adjacent property shall be protected from damage as specified in a) above.

e) The entire parking area shall be paved with a permanent surface of concrete or asphaltic cement and shall be graded and drained in accordance with the city

plumbing code. Any unpaved area of the site shall be landscaped with lawn or other horticultural materials, maintained in a neat and orderly fashion at all times, and separated from the paved area by a raised curb or other equivalent barrier.

And Provided, that a written report of the Commission's decision shall be filed with the Common Council, which shall become final 30 days after the filing thereof unless within that time a protest against such decision is filed with the Council signed by the applicant or by an owner of property within 300 feet of the premises in question. In such event the Council shall, by resolution, approve or disapprove such use.

Rooming houses

Single or two-family dwellings, which may contain home occupations as regulated in Section 83.0105, paragraphs b through h

Special small tool, die, and gauge manufacturing employing not more than 15 persons in manufacturing operations, Provided, that a written report of the Commission's decision shall be filed with the Common Council, which shall become final 30 days after the filing thereof unless within that time a protest against such decision is filed with the Council signed by the applicant or by an owner of property within 300 feet of the premises in question. In such event the Council shall, by resolution, approve or disapprove such use.

Taxi dance halls, as regulated by Section 66.0000

Toiletries or cosmetics goods manufacture

Town houses

Wearing apparel manufacture

Wholesaling, warehousing, storage, or transfer buildings, but excluding steel warehousing, storage of bulk petroleum or related products, or garbage or rubbish. All materials must be completely enclosed within a building.

Uses similar to the above specified uses

95.0300 Permitted with Approval Uses

The following uses, and uses accessory thereto, shall be permitted by the Commission, or Council if specified, and subject to compliance with the provisions and standards as set forth in Section 65.0000 and to all conditions hereinafter listed.

Adult

Adult Book Store as regulated by Section 66.0000.

Adult Motion Picture Theater as regulated by Section 66.0000.

Adult Mini Motion Picture Theater as regulated by Section 66.0000.

Cabaret

Group "D" Cabaret as regulated by Section 66.0000.

Heliports, subject to the approval of the Common Council after report and recommendation from the Detroit Aviation Commission and the City Plan Commission and upon finding that such use is suitable in relation to the features and objectives of the master plan and not contrary to the spirit, intent, and purpose of this district.

Motor vehicle body or fender bumping and painting shops and major motor repairing provided that all operations are conducted entirely within a building, and further, provided, that any wall facing, abutting, or adjacent to residentially zoned property shall consist of a solid blank

wall with no openings whatsoever, excepting that a required secondary exit door, of minimum requiremnts, shall be permitted, and provided further, that all open storage of vehicles awaiting repairs or service shall be enclosed by an opaque wall or fence six feet in height and maintained in a neat and orderly fashion at all times.

Multiple-family dwellings, which may be combined in structures with permitted commercial uses

Public lodging houses, as regulated by Section 66.0000

Rooming houses

Taxi dance halls, as regulated by Section 66.0000

Town houses

Wholesaling, warehousing, storage, or transfer buildings, but excluding steel warehousing, storage of bulk petroleum or related prducts, or garbage or rubbish. All material must be completely enclosed within a building.

The following manufacturing uses:

Wearing apparel manufacturing

Confection manufacturing

Dental products, surgical, or optical goods manufacturing

Jewelry manufacturing

Toiletries or cosmetic manufacturing

Similar manufacturing uses as determined by the Commission

101.0100 Uses Permitted as a Matter of Right

All uses permitted as a matter of right in the B4 or B5 Districts excepting new residential uses and hospitals or

other institutions for the care of humans, hotels or motels; and provided, that the provisions of Section 66.0000 shall also apply to this Section 101.0100.

102.0100 Uses Permitted as a Matter of Right

Uses permitted as a matter of right in the B4 or B5 districts, except public or private elementary, junior high, or high schools; new residential uses; hotels or motels, hospitals or other institutions for the care of humans; and provided, that the provisions of Section 66.0000 shall also apply to this Section 102.0100.

Uses permitted as a matter of right in the B6 district except wholesale or retail produce markets, storage or killing of poultry or small game for retail or wholesale trade, and meat or fish products manufacture or processing; and provided, that the provisions of Section 66.0000 shall also apply to this Section 102.0100.

Section 2. All ordinances or parts of ordinances in conflict herewith are hereby repealed only to the extent necessary to give this ordinance full force and effect.

(JCC p. 2425-30, October 3, 1972)

Passed October 24, 1972.

Approved October 26, 1972.

Published November 1, 2, 3, 1972.

Effective November 2, 1972.

GEORGE C. EDWARDS
City Clerk

APPENDIX H

AN ORDINANCE to amend Chapter 5, Article 2 of the Code of Detroit by amending Sections 5-2-1.1, 5-2-3 and 5-2-24, and by adding new sections to be known as Sections 5-2-1.2, 5-2-9.1 and 5-2-24.1 to include coin operated motion picture devices, adult motion picture theaters, adult mini motion picture theaters, drive-in theaters and concert halls and setting forth the requirements therefor.

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

Section 1. That Chapter 5, Article 2 of the Code of the City of Detroit be amended by amending Sections 5-2-1.1, 5-2-3 and 5-2-24, and by adding new sections to be known as Sections 5-2-1.2, 5-2-9.1 and 5-2-24.1 to read as follows:

Sec. 5-2-1.1.

No amusement consisting of an amusement park, arcade, archery gallery, baseball batting and practice net, outdoor circus, menagerie or exhibits, concert cafe, concert hall, coin-operated motion picture device, golf school, including driving nets, putting greens, practice driving courses or miniature golf courses, kiddie ride, riding device, shooting gallery, tracks, including bicycles, go-cart, midget auto racing or similar devices, or rebound tumbling or trampoline center shall hereafter be established within the city unless a petition shall be filed with the police department signed by fifty-one per cent of the people living or doing business within a radius of five hundred feet of the premises upon which the amusement is to be established; provided, that miniature golf courses may be established upon

the petition of fifty-one per cent of the people living or doing business within a radius of two hundred feet of the premises upon which such miniature golf course is to be established.

It shall be unlawful for any person to hereafter operate an Adult Motion Picture Theater, Adult Mini Motion Picture Theater or Drive-in Theater until he shall have complied with the requirements of the Official Zoning Ordinance, the provisions of this article and other applicable ordinances of the City of Detroit.

Sec. 5-2-1.2. Definitions

For the purpose of this article the following words and phrases shall have the meanings respectively ascribed to them by this section:

Adult Motion Picture Theater:

An enclosed building with a capacity of 50 or more persons used for presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below), for observation by patrons therein.

Adult Mini Motion Picture Theater:

An enclosed building with a capacity for less than 50 persons used for presenting material distinguished or characterterized by an emphasis on matter depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Areas", (as defined below) for observation by patrons therein.

"Specified Sexual Activities":

1. Human genitals in a state of sexual stimulation or arousal;

2. Acts of human masturbation, sexual intercourse or sodomy;

3. Fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

"Specified Anatomical Areas":

1. Less than completely and opaquely covered;

   (a) Human genitals, pubic region, (b) buttock, and

   (c) female breast below a point immediately above the top of the areola; and

2. Human male genitals in a discernibly turgid state, even if completely and opaquely covered.

Sec. 5-2-3.

The Mayor may refuse to issue a license for the operation of any business regulated by this article, and may revoke any license already issued upon proof submitted to him of the violation by an applicant, or licensee, his agent or employee, within the preceding two years, of any criminal statute of the State, or of any ordinance of this city regulating, controlling or in any way relating to the construction, use or operation of any of the establishments included in this article which evidences a flagrant disregard for the safety or welfare of either the patrons, employees, or persons residing or doing business nearby.

Sec. 5-2-9.1

It shall be unlawful for any licensee, his agent or employee to knowingly permit any exhibition or advertising in connection with any establishment regulated under this article depicting, describing or relating to "Specified Sexual Activities" or "Specified Anatomical Area" to be displayed in any manner which is visible from any public street or highway.

Sec. 5-2-24. The license fee for all motion picture theaters, except adult motion picture theaters and adult mini motion picture theaters including all motion picture theaters which, in addition to motion pictures, offer other entertainment, amusement or diversions or which, in addition to motion pictures, offer or exhibit regular stage shows, so-called, or theatricals, shall be based on seating capacity as follows:

(a) Under five fundred seats, fifty-five dollars annually.

(b) Five hundred to one thousand seats, seventy dollars annually.

(c) One thousand one to two thousand seats, ninety-five dollars annually.

(d) Over two thousand seats, one hundred seventy dollars annually.

Sec. 5-2-24.1. The license fee for all adult motion picture theaters and adult mini motion picture theaters, including those which, in addition to adult motion pictures offer other entertainment, amusement or diversions or which, in addition to adult motion pictures offer or exhibit regular stage shows so-called, or theatricals, shall be based on seating capacity as follows:

(A) Adult mini motions picture theaters having less than fifty seats, fifty-five dollars annually.

(B) Adult motion picture theaters:

1. Fifty to five hundred seats, fifty-five dollars annually.
2. Five hundred one to one thousand seats, seventy dollars annually.
3. One thousand one to two thousand seats, ninety-five dollars annually.

4. Over two thousand seats, one hundred seventy dollars annually.

Section 2. This ordinance is declared necessary for the preservation of the public peace, health, safety and welfare of the people of the City of Detroit and is hereby given immediate effect.

Section 3. All ordinances or parts of ordinances in conflict herewith are hereby repealed only to the extent necessary to give this ordinance full force and effect.

(JCC p. 2430-32, October 3, 1972)

Passed October 24, 1972.

Approved October 26, 1972.

Published November 1, 2, 3, 1972.

Effective November 2, 1972.

GEORGE C. EDWARDS
City Clerk

APPENDIX I

ORDINANCE NO. 891-G

CHAPTER 68

AMENDMENT TO TEXT OF ZONING ORDINANCE
Requirement of consent of 51% of adjacent property owners to waive prohibition against establishment of adult businesses in certain areas of city.

AN ORDINANCE to amend Ordinance No. 390-G, entitled: "An Ordinance to establish districts in the City

of Detroit; to regulate the use of land and structures therein; to regulate and limit the height, the area, the bulk and location of buildings; to regulate and restrict the location of trades and industries and the location of buildings designed for specified uses; to regulate and determine the area of yards, courts and other open spaces; to regulate the density of population; to provide for the establishment of a program to develop and upgrade the appearance of places of businesses or other establishments and to provide a local assessment district for the payment of the cost of such improvements according to the benefits to be derived therefrom; to provide for the administration and enforcement of this Ordinance; to provide for a Board of Appeals, and its powers and duties; and to provide a penalty for the violation of the terms thereof," as amended, by amending Sections 66.0103, 101.0300, 102.0300 and 104.0100.

WHEREAS, It has been demonstrated that the establishment of adult businesses in business districts, which are immediately adjacent to and which serve residential neighborhoods, has a deleterious effect on both the business and residential segments of the neighborhood, causing blight and a downgrading of property values; and

WHEREAS, The prohibition against the establishment of more than two regulated uses within 1,000 feet of each other serves to avoid the clustering of certain businesses which, when located in close proximity to each other, tend to create a "skid row" atmosphere; and

WHEREAS, Such prohibition fails to avoid the deleterious effects of blight and devaluation of both business and residential property values resulting from the establishment of an adult book store, adult motion picture theatre,

adult mini motion picture theatre or Group "D" cabaret in a business district which is immediately adjacent to and which serves residential neighborhoods; and

WHEREAS, Concern for, and pride in, the orderly planning and development of a neighborhood should be encouraged and fostered in those persons who comprise the businessand residential segments of that neighborhood; and

WHEREAS, Those business districts in the City of Detroit which serve residential areas (and the downtown loop area which serves the whole city), are designated as B1, B2, B3, B4, B5, and B6 zoned districts; and

WHEREAS, Adult motion picture theatres, adult mini motion picture theatres, adult book stores and Group "D" cabarets are not permitted in B1, B2 or B3 zoned districts, and are only permitted with the approval of the City Plan Commissioin in B4, B5 and B6 zoned districts; and

WHEREAS, the City Plan Commission should be guided by the expressed will of those businesses and residents which are immediately adjacent to the proposed location of, and therefore most affected by the existence of, any adult motion picture theatre, adult mini motion picture theatre, adult book store or Group "D" cabaret in a B4, B5 or B6 zoned district;

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

Section 1. That Ordinance No. 390-G, entitled: "An Ordinance to establish districts in the City of Detroit; to regulate the use of land and structures therein; to regulate and limit the height, the area, the bulk and location of buildings; to regulate and restrict the location of trades

and industries and the location of buildings designed for specified uses; to regulate and determine the area of yards, courts and other open spaces; to regulate the density of population; to provide for the establishment of a program to develop and upgrade the appearance of places of businesses or other establishments and to provide a local assessment district for the payment of the cost of such improvements according to the benefits to be derived therefrom; to provide for the administration and enforcement of this Ordinance; to provide for a Board of Appeals, and its powers and duties; and to provide a penalty for the violation of the terms thereof," as amended, be and the same is hereby amended by amending Sections 66.0103, 101.0300, 102.0300, and 104.0100, to read as follows:

Section 66.0103

It shall be unlawful to hereafter establish any Adult Bookstore, Adult Motion Picture Theatre, Adult Mini Motion Picture Theatre or Group "D" Cabaret in a B4, B5 or B6 Zoned District if the proposed location is within 500 feet of a Residentially Zoned District. This prohibition shall be waived upon the presentment to the City Plan Commission of a validated petition requesting such waiver, signed by 51% of those persons owning, residing, or doing business within 500 feet of the proposed location.

The Commissioner of the Department of Buildings and Safety Engineering shall adopt rules and regulations governing the procedure for securing the petition of consent provided for in this section of the ordinance. The rules shall provide that the circulator of the petition requesting a waiver shall subscribe to an affidavit attesting to the fact that the petition was circulated in accordance with the rules of the Department of Buildings and Safety Engineering and that the circulator personally witnessed the signatures

on the petition and that the same were affixed to the petition by the person whose name appeared thereon.

The City Plan Commission shall not consider the waiver of locational requirements set forth in Sections 66.0000 to 66.0102 until the above described petition, if required shall have been filed and verified.

Section 101.0300

The following uses, and uses accessory thereto, shall be permitted by the Commission, or Council if specified, and subject to compliance with the provisions and standards as specified in Section 65.0000 and to all conditions hereinafter listed.

Adult

Adult Book Stores as regulated by Section 66.0000.

Adult Motion Picture Theaters as regulated in Section 66.0000.

Adult Mini Motion Picture Theaters as regulated by Section 66.0000.

Cabaret

Group "D", Cabarets as regulated by Section 66.0000.

Uses permitted as a matter of right in the M2 district

Hotels or motels as regulated by Section 66.0000

Section 102.0300

The following uses and uses accessory thereto shall be permitted by the Commission, or Council if specified, and subject to compliance with the provisions and standards as set forth in Article VI, Section 65.0000 and to any other conditions hereinafter listed. For heliports and industrial uses, the Commission may approve the use only after a report and recommendation has been received from the Industrial Review Committee.

Any use permitted as a matter of right in the M3 district

Adult

Adult Book Stores as regulated by Section 66.0000.

Adult Motion Picture Theaters as regulated by Section 66.0000.

Adult Mini Motion Picture Theaters as regulated by Section 66.0000.

Cabaret

Group "D", Cabarets as regulated by Section 66.0000.

Heliports

Hotels or motels

Section 104.0100

Uses permitted as a matter of right in the M3 District

Adult

Adult Book Stores as regulated by Section 66.0000.

Adult Motion Picture Theaters as regulated by Section 66.0000.

Adult Mini Motion Picture Theaters as regulated by Section 66.0000.

Cabaret

Group "D" Cabarets as regulated by Section 66.0000

Abrasives manufacture

Acetylene manufacture

Ammonia manufacture

Annealing or heat treating plants

Balls or bearings manufacture

Battery rebuilding

Bed spring manufacture

Bleaching powder manufacture

Boiler works

Bolts or nuts manufacture

Brick or building block manufacture

Candle manufacture

Carbonic gas manufacture or storage

Carbonic ice manufacture

Cattle or sheep dip manufacture

Cellophane or celluloid manufacture

Ceramic products manufacture

Chlorine gas manufacture

Clay products manufacture

Concrete batching plants

Concrete pipe or concrete pipe products manufacture

Dextrine manufacture

Docks (waterway shipping)

Dyestuffs manufacture

Elevators, grain

Engine manufacture

Feed or grain mill

Felt manufacture

Glass manufacture

Glucose manufacture

Graphite manufacture

Gutta percha manufacture or treatment

Ink manufacture (from basic substance)

Jute fabrication

Open storage of equipment or supplies for building or construction contractors

Pharmaceutical products manufacture

Phenol manufacture

Pyroxylin plastic manufacture or processing

Roofing materials manufacture excluding tar products

Rope manufacture

Rug manufacture

Salt works

Sewage disposal plants

Shoe polish manufacture

Soap manufacture

Starch manufacture

Steam generating plants

Sugar refining

Terra cotta manufacture

Tire manufacture

Turpentine manufacture

Wallboard manufacture

Wholesaling, warehousing, storage, or transfer building

Wire manufacture

Yeast manufacture

Uses similar to the above specified uses

Accessory uses, incidental to and on the same zoning lot as the principal use

Section 2. This Ordinance is declared necessary for the preservation of the public peace, health, safety and welfare of the people of the City of Detroit and is hereby given immediate effect.

(JCC p. 707-710, April 2, 1974).

Passed April 23, 1974.

Approved April 30, 1974

Published May 1, 2, 3, 1974.

Effective May 2, 1974.

JAMES H. BRADLEY
City Clerk